UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 733

Case No. 794: DE GARIS

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 18 April 1994, R.M. De Garis, a former staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application requesting the Tribunal, inter alia:

"...

IV. [To] determine that I was erroneously dismissed under FSSR [Field Service Staff Rule] 2.4(e) (...) and that my files both in Montreal and in Saudi Arabia be purged of any implications of unsatisfactory conduct.

V. [To] rule that the Secretary General of ICAO overstepped his authority ... and in so doing did cause damage to my own reputation and career aspirations.

VI. [To order]:

1. Payment of salary and benefits for the balance of my one year contract;
2. Payment of an indemnity equal to one week's salary for each month of uncompleted service under the contract;

3. Payment of noliday pay and benefits;
4. Damage for breach of contract, emotional stress, economic loss and loss of reputation in an amount equivalent to one year's salary, including all benefits;
5. Such further and other relief that the Tribunal may deem just.

..."

Whereas the Respondent filed his answer on 31 October 1994;

Whereas the Applicant filed written observations on 7 December 1994;

Whereas the facts in the case are as follows:

On 24 December 1991, the Applicant signed a contract with ICAO for a period of twelve months "to perform for or on behalf of the Government [of Saudi Arabia] as Air Traffic Controller, Operational Assistance (OPAS), in Riyadh, Saudi Arabia." On 14 January 1992, the Applicant entered the service of ICAO.

In a memorandum dated 3 April 1992, the Chief, Field Personnel Section (FPS), advised the ICAO Technical Cooperation Project Manager in Jedda, Saudi Arabia (ICAO/TCMSA), that the Applicant's probationary period would expire on 13 July 1992, and that under Rule 2.4 of the Field Service Staff Rules (FSSR), appointments may be terminated by one month's notice or salary in lieu thereof. He requested a recommendation as to whether the probationary period should be considered as satisfactorily completed or whether the staff member should be terminated. He noted that the recommendation "should be substantiated by one full written appraisal of the staff member's service by his immediate supervisor."

In a cable dated 4 May 1992, the Project Manager indicated that the Applicant's performance had been "found not satisfactory". He attached an assessment made by the Presidency of Civil Aviation of Saudi Arabia, and signed by the Director General of Air Traffic

Services, co-signed by the Project Manager, ICAO/TCMSA, recommending discontinuation of the Applicant's services. The assessment described relationships with counterparts and associates, attendance and reliability, and overall performance as unsatisfactory.

In a memorandum dated 7 May 1992, the Director, Technical Cooperation Bureau, informed the Secretary General that the Applicant's performance had been found unsatisfactory. He noted that "it is not the first case of termination of Air Traffic Controllers' contracts in Riyadh for reasons of inability to cope with the density of traffic..." He recommended that the Secretary General approve the termination of the Applicant's contract, in accordance with Article IV, paragraph 3, of his OPAS contract "and for reasons of unsatisfactory performance during his probationary period".

The Secretary General replied on 8 May 1992, directing that the Applicant should be invited to resign with the understanding that if he did not, his contract would be terminated. On 13 May 1992, the Project Manager advised the Director, Technical Cooperation Bureau, that the Applicant preferred the option of resignation. However, before exercising the option, "he requests a written assurance that he will retain benefits available if he had not taken the option."

In a memorandum dated 16 May 1992, the Project Manager confirmed in writing to the Applicant that (1) the Applicant's service on probation had been found not satisfactory; (2) the Secretary General would decide to terminate his contract, under FSSR Rule 2.4(e), and he would be provided with air tickets and shipment of his household goods; and (3) the Secretary General would have no objection if the Applicant proposed to resign before his contract was terminated. With regard to the Applicant's query, he noted that normally, following resignation, a staff member would not be entitled to payment of travel and removal expenses, but that in his case, the Secretary General would be willing to authorize such

payment on an exceptional basis. Finally, he stated that the Applicant would not be entitled to payment of a termination indemnity, whether he resigned or his contract was terminated.

On 22 May 1992, the Director, Technical Cooperation Bureau, advised the Secretary General that the Applicant had refused to resign. On 25 May 1992, the Secretary General approved the termination of the Applicant's contract. In a letter to the Project Manager, dated 24 May 1992, the Applicant stated that his performance had not been unsatisfactory and that his contract was being terminated for budgetary reasons. He further stated "I effectively have no choice and hereby tender my resignation to be effective as of July 11, 1992. Accrued earned statutory and national holiday credits are to be taken prior to this date." Finally, the Applicant commented: "I assumed that ... I would only be terminated if my performance was genuinely found wanting, and not simply for budgetary convenience. At the very least ... I would have expected to have been terminated under paragraph 9.4C and D as redundant ..."

On 26 May 1992, the Chief, FPS, informed the Project Manager that the Applicant's case had been submitted to the Secretary General for termination "as resignation letter [was] not received on time." In a further telex on the same date, the Chief, FPS, advised the Project Manager that the Secretary General had approved the termination of the Applicant's contract. On 28 May 1992, the Project Manager informed the Applicant accordingly. He noted that his resignation had been received after approval of the termination, and that it was not acceptable because it did not provide one month's notice.

On 31 May 1992, the Applicant informed the Secretary General that he was filing an appeal against his dismissal, which he stated "was undertaken for reasons other than performance". In a reply dated 22 June 1992, the Director, Technical Cooperation Bureau, informed the Applicant that the Secretary General had decided "not

[to] review his decision." On 30 June 1992, the Applicant separated from service. On the same date, he lodged an appeal with the Advisory Joint Appeals Board (AJAB). On 21 February 1994, the AJAB adopted its report. Its conclusions read as follows:

> "127. Having considered the merits of this case, the Board unanimously concludes that:
>
> (a) The provisions of the FSSR and FOM [Field Operations Manual] in relation to termination generally and more specifically during the probationary period are applicable to this case.
>
> (b) The decision of the Secretary-General to terminate the Appellant's contract under FSSR Rule 2.4(e) was improperly arrived at and was not in accordance with the relevant provision of the FSSR, the FOM and due process of law.
>
> (c) The Organization, due to circumstances beyond its control, had no option but to terminate the Appellant's contract.
>
> 128. It is the opinion of the Board that under the circumstances the Organization should have terminated the Appellant's contract on the basis of article IV.4 of the contract or FSSR Rule 9.4(d). In the light of the foregoing the Board recommends unanimously that the Appellant be paid termination indemnities in accordance with Rule 9.7(b) of the FSSR.
>
> 129. The Board also recommends that the Appellant be compensated for the days of accrued annual leave which were included in his 30-day notice period.
>
> 130. Furthermore in view of the damage done to the reputation of the Appellant and moral injury caused to him, the Board recommends that the Secretary General pay the Appellant damages of US dollars 5,000.
>
> 131. It is also the opinion of the Board that there is no documentary evidence as to the professional incompetence of the Appellant. The Board further recommends that a copy of this Opinion be placed on the Appellant's personnel files both at Headquarters and in Saudi Arabia. The Board also recommends that a letter be sent to the Appellant stating that his dismissal from his post as Air Traffic Controller in

Riyadh was for reasons beyond the control of the Organization and in no way detracts from his professional qualifications and ability.

132. The Board makes no other recommendations in this case."

On 18 March 1994, the Secretary General informed the Applicant that he was "unable to accept the conclusions and recommendations of the Board in this case."

On 18 April 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment constituted non-observance of his contract of employment and the ICAO FSSR.

2. The termination of his employment was carried out for reasons of expediency at the expense of the Applicant's reputation.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's contract did not constitute an abuse of power.

2. The Applicant's conditions of employment were governed by his contract and he was therefore responsible only to the Saudi Government.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. By contract between the International Civil Aviation Organization (ICAO) and the Applicant, he was appointed to the post of Air Traffic Controller in Riyadh, Saudi Arabia. The contract provided inter alia:

"Article IV

...

3. The Officer shall be on probation for six months following the commencement of the appointment. ...

If during the period of probation, the Organization is not satisfied with the services of the Officer, the Contract may be terminated by one month's notice in writing or by salary in lieu thereof. The decision of the Organization in this respect shall be final.

4. This Contract may be terminated by either party upon one month of written notice. Should the Organization so terminate the Contract, it shall pay to the Officer an indemnity equal to one week's salary for each month of uncompleted service under this Contract, subject to a minimum of six weeks and a maximum of three months.

However, no indemnity shall be due if the termination of the Contract is based ... on the unsatisfactory service of the Officer during the probation period."

In addition, an annex to the contract stipulated that:

"1. In accordance with Article II, paragraph 6 of the Contract, benefits mentioned in Article II are to be provided by the Organization under terms, conditions and definitions generally the same as those applicable to its staff members in the category of field service staff. The ICAO Field Service Staff Rules govern the conditions of service applicable to field service staff employed under the various ICAO projects of Technical Co-operation. ...

2. Benefits under Article II will therefore, in general, be those described in the booklet entitled 'ICAO Field Service Staff Rules'. ..."

II. Further, by letter dated 23 October 1991, a Personnel Officer sent the Applicant a copy of the ICAO Field Service Staff Rules (FSSR) with the following advice:

"... Please read the rules carefully: they establish the benefits to which you are entitled during the period of your service ..."

The Applicant commenced his appointment in Riyadh on 14 January 1992.

III. On 3 April 1992, the Chief, Field Personnel Section (FPS), sent a memorandum to the Project Manager in Jeddah, Saudi Arabia, indicating that the Applicant's probationary period expired on 13 July 1992 and that a recommendation was required to determine his future contractual status. The recommendation had to be "substantiated by one full written appraisal of the staff member's service by his immediate supervisor." On 4 May 1992, the Project Manager replied, submitting an appraisal signed by the Director General of Air Traffic Services of Saudi Arabia, and not by the Applicant's immediate supervisor, that the Applicant's performance had been found not to be satisfactory.

IV. On 7 May 1992, the Director, Technical Cooperation Bureau, ICAO, wrote to the Secretary General recommending his approval of the termination of the Applicant's appointment.

The letter also made reference to provisions in the Applicant's contract, as well as ICAO statutory provisions, including FSSR Rule 9.4 and Rule 2.4(e), regarding termination.

V. On 26 May 1992, the Chief, FPS, informed the Project Manager in Jeddah that the Secretary General had approved termination of the Applicant's contract for reasons of unsatisfactory service, in accordance with article IV, paragraph 3 and that FSSR Rule 2.4(e) - Probation and FSSR Rule 9.7(f) - Indemnities on Termination, applied in his case. The Applicant was informed of the termination on 28 May 1992.

The Applicant appealed this decision. The ICAO Advisory Joint Appeals Board (AJAB) concluded that the Secretary General's decision "was improperly arrived at and was not in accordance with the relevant provision of the FSSR, the FOM and due process of law".

It recommended payment to the Applicant of a termination indemnity in accordance with FSSR Rule 9.7(b), and compensation for the days of accrued annual leave included in his 30-day notice period. The Secretary General rejected the AJAB's recommendation.

VI. The Applicant asks for (i) payment of salary, benefits, and holiday pay for the balance of his one year contract; (ii) an indemnity equal to one week's salary for each month of uncompleted service; and (iii) damages for breach of contract, economic loss and emotional distress. He also requests that adverse material be expunged from his record.

The Respondent argues that the FSSR and the FOM do not apply to Air Traffic Controller, Operational Assistance (OPAS) personnel since they are not staff members. Consequently, they do not apply to the Applicant's contract.

Having reviewed the material, the Tribunal notes that several references to the FSSR and the FOM were made by the Respondent throughout the Applicant's term of service. The memorandum of 3 April 1992 was based upon the Probationary Report Form found in Chapter 16 of the FOM. It was sent by the Chief, FPS, to the Project Manager, and it made reference to FSSR Rule 2.4, as governing the probationary period, noting that the Applicant's probationary period was due to expire. In addition, the Respondent made reference to the FSSR when he terminated the Applicant's contract. The Project Manager informed the Applicant that FSSR Rule 2.4(e), on termination due to unsatisfactory performance during probation, and FSSR Rule 9.7(f), on the application of indemnities to termination under FSSR Rule 2.4(e), applied to his case.

VII. Based on the above, the Tribunal finds that the Respondent's contention that the rules and procedures in the FSSR and the FOM do not apply to OPAS personnel is unfounded. In fact, as noted above,

it was the Respondent himself who made numerous references to them and applied them when suitable. If these rules were inapplicable, this should have been made clear to the Applicant.

VIII. The Organization used the form found in Chapter 16 of the FOM to assess the Applicant's performance. This required that any recommendation be confirmed by a full written appraisal by the employee's immediate supervisor. In the Applicant's case, the appraisal submitted was not, as required by the form, written by his immediate supervisor, nor was it confirmed by him. The Tribunal held in Judgement No. 272, Chatelain (1981), paragraphs II and III that:

> "II. ... the decision to terminate the Applicant's appointment on the basis of adverse reports cannot stand if it is shown that
>
> (a) the Administration has not complied with the relevant procedures laid down in the ICAO Service Code and in the ICAO General Secretariat Instructions (GSI); or that
>
> (b) the Applicant's appointment has not been terminated in accordance with due process of law.
>
> III. Even if the Tribunal accepts the Respondent's argument that the Applicant was still on probation at the time of her termination, the Secretary General's decision, in the Tribunal's view, cannot be final if it has been improperly arrived at."

IX. The Tribunal agrees with the Applicant's submission that a parallel exists between his case and that of Chatelain. In both cases, the procedures followed to terminate the Applicant's contract did not comply with the relevant provisions of the FSSR and ICAO did not follow the procedures required by the FOM. In addition, in the present case, the Organization did not make any effort to obtain information to support or to challenge the allegations made in the report. It is a fundamental principle of law that a person has the right to be heard and given an opportunity to respond to allegations

against him or her. In failing to provide for this right, the Respondent did not provide the due process of law to which the Applicant was entitled.

X. The Respondent claims that in terminating the Applicant's contract, he was simply respecting the wishes of the Government of Saudi Arabia. During his oral submissions to the AJAB, as well as in the written submission before the Tribunal, the Respondent states that the Applicant was responsible to the Government of Saudi Arabia and that it was the host country that took the decision to terminate the Applicant's contract. The Tribunal recognizes that this decision was beyond the Respondent's control. Nevertheless, the implementation of this decision was within the control of the Respondent. He elected to terminate the contract pursuant to article IV, paragraph 3, rather than under article IV, paragraph 4. The Respondent may have been compelled to terminate the Applicant's contract, but he was not compelled to do so under article IV, paragraph 3, which relates to unsatisfactory performance. He could and should have applied article IV, paragraph 4 of the contract or FSSR Rule 9.4(d).

XI. For the foregoing reasons, the Tribunal finds that:

1. The termination of the Applicant's contract under article IV, paragraph 3 of his contract was improper. The Respondent should have applied article IV, paragraph 4, which provides for an indemnity equivalent to one week's salary for each month of uncompleted service subject to a minimum of six weeks and a maximum of three months. The Applicant is entitled to this indemnity.

2. The Applicant is entitled also to compensation for the unfair treatment to which he was subjected. The Tribunal assesses this compensation at an amount equal to three months of his net base salary at the date of his separation from service.

XII. Accordingly, the Tribunal orders the Respondent:

1. To pay to the Applicant a termination indemnity equivalent to one week's salary for each month of uncompleted service subject to a minimum of six weeks and a maximum of three months;

2. To pay to the Applicant compensation in the amount of three months of his net base salary at the date of his separation from service; and

3. To remove from the Applicant's personnel file all adverse material relating to his performance.

XIII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary